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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FLOYD M. CHODOSH et al. Plaintiffs and Appellants, v. JOHN K. TROTTER et al., Defendants and Respondents.	D070952, D070953 (Super. Ct. No. 30-2014-722371)

APPEAL from orders and judgment of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Affirmed.

Law Office of Patrick J. Evans and Patrick J. Evans for Plaintiffs and Appellants.

Long & Levitt LLP, Joseph P. McMonigle, Jessica R. MacGregor, David S. McMonigle, and Noah S. Rosenthal for Defendants and Respondents.

Floyd M. Chodosh, Susan Eicherly, Bonnie P. Harris, Myrle A. Moore, Ole Haugen, and Chris McLaughlin (together, plaintiffs) sued the Honorable John R. Trotter (retired) and JAMS, Inc. (together, defendants) on numerous grounds, based on Justice Trotter's mediation of plaintiffs' litigation against the Palm Beach Park Association (the Association). Defendants filed a special motion to strike pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP (strategic lawsuit against public participation) statute.[1] The trial court found defendants' conduct was protected litigation-related activity, and that plaintiffs could not meet their burden in opposing the motion due to mediation confidentiality, quasi-judicial immunity, and the litigation privilege. The court granted the motion, awarded attorneys' fees to defendants, and dismissed the action.

Plaintiffs appealed. They argue the court's anti-SLAPP rulings were in error, but do not address the fee ruling. We conclude the court properly granted the anti-SLAPP motion, deem the fee issue waived (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4), and affirm the orders and judgment in favor of defendants.

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1 Except as noted *post*, further statutory references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND[2]

I. *Underlying litigation and mediation proceedings*

Plaintiffs resided in the Palm Beach Mobilehome Park in San Clemente and were members of the Association. According to plaintiffs, the Association imposed a special assessment in 2007, and made loans to a number of members in the amount of the assessment. In 2010, plaintiffs and other residents (collectively, the PBPA plaintiffs) sued the Association regarding the assessment and the loans, and the cases were consolidated in a single action before the Honorable Nancy Wieben Stock. (*In re Palm Beach Park Association Cases,* Orange County Super. Ct. Case No. 30-2010-00423544-CU-BC-CXC.)

In February 2013, the parties mediated with the Honorable James L. Smith (retired) at JAMS, and the matter did not settle. The trial court held a Phase I bench trial on certain issues. In May 2013, the court delivered its tentative rulings and addressed next steps in terms of "courtroom" and "out-of-courtroom" ideas. As to the latter, the court stated: "You might want to consider using a very sophisticated mediator to help you navigate through some of the difficult discussion points. [¶] The current mediator that you have been utilizing for your pretrial efforts is, in the court's view in that league

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2 As discussed *post*, plaintiffs' allegations about communications at the mediation are barred by mediation confidentiality. We relate them solely for purposes of addressing plaintiffs' claims. We further note plaintiffs' factual summary, particularly as to court conferences in the underlying litigation, is substantially one-sided and argumentative. (See Cal. Rules of Court, rule 8.204(a)(2)(C) [brief must "[p]rovide a summary of the significant facts"]; *In re S.C.* (2006) 138 Cal.App.4th 396, 402 ["appellant must fairly set forth all the significant facts, not just those beneficial to the appellant"].) We rely on the record as needed to supply the significant facts.

and in that category. But if for any reason a different mediator were deemed to be more advisable, I would, nonetheless, still urge you to consider using outside services, if necessary . . . . I strongly recommend—but I have no authority—to order you to do those things." The court set a trial setting conference and ordered the Association to initiate a joint status report with updates on both in-court and out-of-court solutions.

The parties returned to mediation in September and October 2013, this time with Justice Trotter. Plaintiffs' complaint states the Association "approached Plaintiffs through the offices of a prominent plaintiff lawyer intermediary. . . . He requested that Plaintiffs agree to mediate again. [¶] The prominent lawyer suggested that Plaintiffs utilize Justice TROTTER as the mediator. Plaintiffs agreed to attend a mediation with Justice TROTTER at JAMS but not to pay for it." According to plaintiffs, the following statements and omissions occurred at the September mediation: "Justice Trotter stated he knew [Judge Stock] and that she had suffered a heart attack. No one from JAMS said or disclosed anything about . . . [her] having an arrangement or being in discussions with JAMS about her working at JAMS after she retired from the bench." The matter did not resolve.

At a status and trial setting conference in October 2013, the trial court stated: "Further mediation opportunities should be taken advantage of . . . . [¶] I think it's well known that Justice Trotter is one of the most skilled neutrals in the nation. So you are in good hands at least in that context." Association's counsel indicated it planned "to utilize Justice Trotter as to the go-between on the settlement documents . . . ." The court asked PBPA plaintiffs' counsel about "the possibility of settlement under the auspices of Justice

Trotter." Plaintiffs' counsel stated: "[A]t this point we would be happy to work with Justice Trotter, work with the other side, try to get this case resolved. Obviously, this case just cries out for resolution." The court noted: "[W]ith Justice Trotter navigating back and forth . . . , if there are proposals . . . that need to be discussed, my strong recommendation is to keep the conversation going." The court further noted: "[T]here are means by which parties can build in expectations, provide for accountability, but still get to the finish line. And I'm sure Justice Trotter has all of those in his [playbook] and you are experienced counsel, you would know as well." The court indicated there were "two choices" for further settlement talks, "directly communic[ating] in writing" or "through your mediator," and recommended defense counsel "clear the air, submit a written proposal with basic terms that doesn't have to be a final settlement agreement, or engage Justice Trotter . . . . "

In November 2013, the parties again mediated with Justice Trotter, and again did not resolve their dispute. According to plaintiffs, the following events took place: Justice Trotter suggested the PBPA plaintiffs and Association directors meet without counsel; they did so, reached an impasse, and went to get Justice Trotter. He allegedly told the PBPA plaintiffs that "the settlement . . . was a gift and that he would personally tell 'Judge Nancy' that Plaintiffs refused to settle . . . and were the reason why settlement

was not reached." He returned shortly thereafter, asked if there was a settlement, and, when the PBPA plaintiffs responded no, shut the door and left.[3]

In December 2013, the parties attended another status and trial setting conference. The PBPA plaintiffs sought a phased trial on the remaining issues, while the Association requested an unphased trial. The court set an unphased jury trial for May 2014. In January 2014, Judge Stock retired and the case was reassigned to the Honorable Robert J. Moss. Plaintiffs' counsel received information in February 2014 that Judge Stock had joined JAMS.

In May 2014, the PBPA plaintiffs moved to disqualify Judge Stock retroactively and to void her order for a jury trial. They alleged, among other things, that she directed the parties to continue mediating with Justice Trotter while she was in (or discussing) an arrangement with JAMS. They also moved to disqualify Judge Moss, on grounds that he communicated with Judge Stock and "might have . . . an interest in joining JAMS." Judge Moss denied the requests, finding no factual support for plaintiffs' allegations. The PBPA plaintiffs filed a petition for writ of mandate to vacate this ruling, which was denied.

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[3] Plaintiffs claim, without citation to the record, that Justice Trotter "stated he would tell 'Judge Nancy' [plaintiffs] were the 'bad guys.' " We will not consider this alleged statement. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ["[I]t is counsel's duty to point out portions of the record . . . ."].)

II. *Litigation below*

In May 2014, plaintiffs here filed this lawsuit against defendants for breach of contract, fraudulent concealment, negligence, intentional and negligent infliction of emotional distress, intentional and negligent misrepresentation, and unfair business practices (Bus & Prof. Code, § 17200 (Unfair Competition Law, hereafter the UCL)). The claims were based on Justice Trotter's alleged threat, in front of the Association directors, to tell Judge Stock that plaintiffs were the reason the case did not settle and the purported failure to disclose Judge Stock was joining JAMS. With respect to the alleged threat, the complaint stated: "[W]hile Plaintiffs should and do take Justice TROTTER at his word, they do not, at this time, specifically allege that ex parte communications occurred. . . . However, Plaintiffs could and do reasonably perceive a very high risk that Justice TROTTER communicated with the trial judge about the case because the facts show JAMS was in discussions with Hon. Nancy Wieben Stock about her joining JAMS."

Defendants filed a special motion to strike the complaint under anti-SLAPP, asserting their alleged acts were protected litigation-related conduct, and plaintiffs could not establish a likelihood of prevailing due to mediation confidentiality, quasi-judicial immunity, and the litigation privilege. Plaintiffs opposed the motion, challenging these arguments, and provided declarations from Chodosh and two other plaintiffs regarding Justice Trotter's alleged communications at the mediation sessions. Defendants objected to the declarations.

At the hearing, the trial court addressed the evidence. With respect to plaintiffs' statements in declarations about the alleged threat, the court noted: "[O]bviously [Justice] Trotter and Judge Stock can't counter that evidence, . . . their hands are tied . . . ." The court also observed there was "no evidence . . . [Judge Stock] was in any kind of conversations with JAMS at this time" and "no evidence . . . [Justice Trotter] ever had a conversation with Judge Stock about the case."

The trial court granted the anti-SLAPP motion. The court found the "gravamen of all of Plaintiffs' claims arise[s] out of statements made in connection with an issue under consideration by a judicial body and in mediation," and defendants thus met their burden to show the action arose from protected activity.

The court then determined plaintiffs did not meet their burden to present admissible evidence demonstrating a probability of prevailing on their claims. First, the court found "the statements made by Justice Trotter [were] inadmissible because they are protected by the mediation privilege set forth in Evidence Code section 1115 et seq." The court explained the statute "sets forth an extensive statutory scheme protecting the confidentiality of mediation proceedings, with narrowly delineated exceptions" and prohibits participants and mediators alike from revealing mediation communications. Second, the court found defendants "are protected by quasi-judicial immunity." The court stated this immunity "extends to services provided by Defendants in mediation, . . . even breach of contract claims except in rare cases where the mediator completely fails to conduct a mediation," and found plaintiffs "failed to establish that Defendants have completely failed to conduct a mediation and that judicial immunity does not apply."

Finally, the court found "the communications at issue are entitled to absolute protection under the litigation privilege." The court explained the privilege applies to settlement negotiations, and plaintiffs "failed to present admissible evidence demonstrating that the statements made exceed the protection afforded under the litigation privilege."

The court declined to rule on defendants' objections to plaintiffs' declarations (due to noncompliance with the Cal. Rules of Court), but stated it "considered only admissible evidence in ruling on the motion." Defendants moved for attorneys' fees and costs under section 425.16, which the trial court granted. The court entered judgment for defendants, and plaintiffs timely appealed.

DISCUSSION

I. *The Anti-SLAPP statute and standard of review*

"[S]ection 425.16 requires the trial court to undertake a two-step process in determining whether to grant a SLAPP motion. 'First, the court decides whether the defendant has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue.' [Citation]. [¶] If the court finds the defendant has made the requisite showing, the burden then shifts to the plaintiff to establish a 'probability' of prevailing on the claim by making a prima facie showing of facts that would, if proved, support a judgment in the plaintiff's favor. [Citation.] . . . [I]n assessing the probability the plaintiff will prevail, the court considers only the evidence that would be admissible at trial." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906 (*Kashian*).)

"Whether section 425.16 applies, and whether the plaintiff has shown a probability of prevailing, are both questions we review independently on appeal." (*Kashian, supra*, 98 Cal.App.4th at p. 906.) " 'The burden of affirmatively demonstrating error is on the appellant.' " (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)[4]

II. *Analysis*

A. *Prong one: Whether defendants established their conduct was protected*

A defendant meets its anti-SLAPP burden " 'by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e).' " (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "[I]t is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the

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4 Plaintiffs' briefs are deficient, in addition to the factual summary issue noted *ante*. First, briefs must"[s]tate each point under a separate heading or subheading summarizing the point . . . ." (Cal. Rules of Court, rule 8.204(a)(1)(B).) Plaintiffs' arguments are not confined to discrete headings and sections, and are repetitive. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294-1295 (*Provost*) ["[W]e do not consider all of the loose and disparate arguments . . . . [Citation.] [O]nce we have discussed and disposed of an issue it will not necessarily be considered again . . . ."].) Second, " '[e]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived . . . .' " (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*); Cal. Rules of Court, rule 8.204(a)(1)(B).) Plaintiffs fail to provide authority to support multiple arguments. Finally, " ' "points raised in the reply brief for the first time will not be considered," ' " absent good reason. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.) Plaintiffs raise certain points for the first time on reply. To the extent we understand their arguments and they are proper, we will consider them. If they intended to make other arguments, they are forfeited for lack of adequate briefing.

anti-SLAP[P] statute applies." (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414 (*Scott*).)

1. *Statements in connection with issue under consideration by judicial body*

One category of protected conduct includes "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e).) Courts "have adopted a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." (*Kashian, supra*, 98 Cal.App.4th at p. 908.)

Protected litigation-related activities include statements made as part of settlement negotiations. (See, e.g., *Navellier v. Sletten* (2002) 29 Cal.4th 82, 87, 85-86 [anti-SLAPP statute applied to claim that party "committed fraud in misrepresenting . . . intention to be bound" by release in prior action]; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963-967 (*Seltzer*) [reversing denial of anti-SLAPP motion in homeowner's action for fraud in connection with settlement negotiations in underlying lawsuit]; *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 908 [affirming grant of anti-SLAPP motion in lawsuit based on firm's communication of settlement offer]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 [attorney's negotiation of stipulated settlement in unlawful detainer action was protected conduct].)

Plaintiffs do not dispute settlement negotiations are protected conduct under anti-SLAPP. Instead, they argue anti-SLAPP does not apply here because defendants'

conduct was unlawful, citing a number of statutes and rules, and because there is no anti-SLAPP protection for false advertising.[5] Neither argument has merit.

2. *Illegal conduct*

"[C]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is alleged to have been unlawful or unethical. If that were the test, the statute (and the privilege) would be meaningless." (*Kashian, supra,* 98 Cal.App.4th at pp. 910-911, fn. omitted.) There is a "narrow circumstance in which a defendant's assertedly protected activity could be found to be illegal as a matter of law and therefore not within the purview of section 425.16"; namely, "where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence, the motion must be denied." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 315-316 (*Flatley*); *id.* at p. 332 [demand letter threatening to publicize rape allegations and other alleged crimes was "criminal extortion as a matter of law . . . [¶] . . . based on the specific and extreme circumstances of this case"].) Plaintiffs do not establish *Flatley* precludes defendants from meeting their burden.

a. *Testimony regarding the mediation*

We begin with two threshold issues: mediation confidentiality and the Evidence Code section 703.5 bar on mediator reports about the mediation. As we shall explain,

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[5] The cited sources include: (i) Evidence Code section 1121; (ii) conspiracy under Penal Code section 182; (iii) extortion and attempted extortion under Penal Code sections 518 and 524; (iv) Civil Code sections 1572, 1709, and 1710 (which they characterize as implicating fraud, intentional misrepresentation and deceit, and false advertising); (v) Business and Professions Code sections 6068 and 6128, and Rules of Professional Conduct, rule 5-300(B); and (vi) Code of Civil Procedure section 170.1.

these principles apply here, meaning plaintiffs have no admissible evidence about the mediation and for this reason—among others—cannot establish the narrow exception under *Flatley*.

i. *Mediation confidentiality*

The trial court found the alleged statements made by Justice Trotter were inadmissible under the Evidence Code provisions governing mediation. The court did not err in this regard. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444 [addressing anti-SLAPP motion; "[w]e review the trial court's evidentiary rulings for an abuse of discretion"]; see *Kashian, supra*, 98 Cal.App.4th at p. 906 [only admissible evidence may be considered].)[6]

Evidence Code section 1119, subdivision (a) provides, in relevant part, that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible" in noncriminal proceedings. Evidence Code section 1119, subdivision (c) states that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." Participants include the mediator. (Evid. Code, § 1122.) These provisions "are clear and absolute," and "[e]xcept in rare circumstances, they must be strictly applied and do not

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6 The court used the term mediation privilege, but "mediation confidentiality" better describes the protections provided to communications made in connection with mediation (see *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 150, fn. 4), and we will use that term. We also note defendants do not rely on Evidence Code section 1152 (offers to compromise), as plaintiffs suggest, and we do not address it.

permit judicially crafted exceptions or limitations, even where competing public policies may be affected." (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 118 (*Cassel*).)

Justice Trotter's alleged communications here are from mediation proceedings. These communications are confidential. (See *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 6-8 (*Foxgate*) [rejecting exception that would permit mediator or party to reveal mediation communications relating to allegedly sanctionable conduct by a party], 13-14 ["[Evidence Code] [s]ection 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation."].)

Plaintiffs fail to establish mediation confidentiality should not apply.

First, they argue Justice Trotter's purported lack of neutrality, illustrated by his alleged statements in front of the Association directors, meant there "was not and could not have been a 'mediation,' " citing the parallel definitions in the Evidence Code and California Rules of Court (as well as JAMS materials). (Evid. Code, § 1115, subds. (a)-(b) [" 'Mediation' means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement[;] [¶] . . . 'Mediator' means a neutral person who conducts a mediation."]; Cal. Rules of Court, rule 3.852(1)-(2) [accord].)[7] This argument implicates statutory

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7 Plaintiffs also contend (i) defendants' decision not to seek costs for documents from the PBPA litigation reflects cooperation with the Association and, thus, a lack of neutrality, and (ii) their failure to disclose Judge Stock was joining JAMS prevented "formation of mediation." Because we reject their interpretation of the meaning of "mediation," we need not address these particular contentions.

interpretation, and plaintiffs' view is contrary to the plain language of the statute. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 (*Nolan*) ["The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] . . . When the language of a statute is clear, we need go no further."].) Neutral in this context implies the individual is not affiliated with a party. (See *Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536, 540 ["During [mediation], a neutral third party with no decisionmaking power intervenes in the dispute to help the litigants voluntarily reach their own agreement."]; *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 265 (*Saeta*) [mediation confidentiality did not apply to termination review board; noting "mediation appears to require a neutral mediator or group of mediators," and that "[a]part from [a retired judge], this review board was comprised of two others, both employees of Farmers. An attorney or other *representative of a party is not a mediator*."].)

This interpretation is consistent with the California Law Revision Commission comments on Evidence Code section 1115, and the purpose of mediation confidentiality. (See Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (2009 Ed.) foll. § 1115, p. 382 ["An attorney or other representative of a party is not neutral and so does not qualify as a 'mediator' for purposes of this chapter."]; *Cassel, supra,* 51 Cal.4th at p. 124 ["the purpose of these provisions is to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant"].) To permit a party to claim after the fact that the mediator

acted in a biased manner, and that mediation confidentiality did not apply, could discourage parties from mediating in the first place.

Plaintiffs maintain neutrality is a fact question, citing the concurrence and dissent of Justice Danielson in *Howard v Drapkin* (1990) 222 Cal.App.3d 843 (*Howard*). We disagree. In *Howard*, the mother in a family law dispute sued a psychologist case evaluator retained by the parties for professional negligence and other claims, the psychologist demurred, and the trial court sustained the demurrer. (*Id.* at p. 850.) The Court of Appeal affirmed, concluding the psychologist, as a nonadvocate, was protected by quasi-judicial immunity, as well as the litigation privilege. (*Id.* at pp. 863-864.) Justice Danielson disagreed as to quasi-judicial immunity on the grounds that, among other things, neutrality could not be assumed. (*Id.* at p. 865 (conc. & dis. opn. of Danielson, J.).) But the majority stated immunity applies to those who function as neutrals, confirming the focus is on role, not conduct. (*Id.* at p. 860.) And mediation confidentiality was never at issue. " 'It is axiomatic that cases are not authority for propositions not considered.' " (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Second, plaintiffs contend application of mediation confidentiality here "violates due process and leads to an absurd result," referencing a narrow exception identified—but not applied—in *Cassel*. In *Cassel*, the California Supreme Court found Evidence Code section 1119 applied to "communications between a mediation participant and his or her own attorneys outside the presence of other participants in the mediation," and precluded a legal malpractice action from proceeding. (*Cassel*, *supra*, 51 Cal.4th at pp. 121-122.) The court explained: "We must apply the plain terms of the mediation

confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose. No situation that extreme arises here." (*Id.* at p. 119.)[8]

The due process issues and absurd results alleged by plaintiffs do not warrant an exception. Plaintiffs argue defendants "denied [them] due process by threatening to unlawfully taint their constitutional right to an impartial judge," and also that depriving them of a claim against defendants "denies them due process." The issue is not whether defendants impeded plaintiffs' due process rights, but whether mediation confidentiality would do so. And even if their ability to pursue claims were limited by mediation confidentiality, *Cassel* confirms this scenario does not, without more, establish a due process violation: "We further emphasize that application of the mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds. Implicit in our decisions in *Foxgate*, *Rojas*, *Fair*, and *Simmons* is the premise that the mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest." (*Cassel*, *supra*, 51 Cal.4th at p. 135; see *Foxgate*, *supra*, 26 Cal.4th at pp. 17-18; *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 574, 586

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8 Plaintiffs cite Justice Chin's concurrence in *Cassel*, where he "concur[red] in the result, but reluctantly," expressed concerns about attorneys not being held accountable, and still concluded the results were not absurd (though "just barely"). (*Cassel*, *supra*, 51 Cal.4th at p. 138 (conc. opn. of Chin, J.)) We reject plaintiffs' view of this concurrence as "rein[ing] in *Cassel*." Justice Chin was explaining the consequences of mediation confidentiality, not altering it—a task which both he and the majority agreed is for the Legislature. (*Id.* at p. 124; *id.* at pp. 139-140 (conc. opn. of Chin, J.).)

[rejecting exception for alleged oral contract at mediation]; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194 [affirming exclusion of statements regarding purported settlement at mediation]; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415-416 [rejecting good cause exception]; see also *Provost, supra*, 201 Cal.App.4th at pp. 1302-1303 [Evid. Code, § 1119 precluded plaintiff from establishing duress and coercion at mediation where, among other things, mediator allegedly told him defendants "would have criminal charges filed . . . if he did not sign the stipulated settlement"].)[9]

We also find unpersuasive plaintiffs' claim that use of the "mediation statutes to protect . . . mediator misconduct" is an absurd result contrary to legislative intent. The intent of the Evidence Code mediation provisions is to encourage mediation. (*Cassel, supra*, 51 Cal.4th at p. 124.) This requires confidentiality, which means participants generally must forego claims arising from mediation conduct. (*Id.* at p. 133 ["As the court in *Wimsatt* acknowledged, '[t]he stringent result we reach here means that when clients . . . participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation . . . .' "].)

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9 *Milhouse v Travelers Commercial Ins. Co*. (C.D. Cal. 2013) 982 F.Supp.2d 1088, cited by plaintiffs here, does not compel a different result. (Compare *id.* at p. 1108 [due process entitled defendant to admit evidence of its own mediation conduct]; with *Silicon Storage Technology, Inc. v. National Union Fire Insurance Co. of Pittsburgh* (N.D. Cal. 2015) 2015 WL 4347711, at *4 [*Milhouse* "appears to be in conflict with . . . *Cassel*"]; see *Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [" 'decisions of the lower federal courts are not binding precedent' "].) Plaintiffs' reliance on Civil Code section 3523 ("[f]or every wrong there is a remedy") does not aid them either. There are numerous limits on actions under California law.

Plaintiffs' reliance on Evidence Code section 1121 to establish absurd results is unavailing. That section provides that "[n]either a mediator nor anyone else may submit to a court . . . any report, assessment, evaluation, recommendation, or finding of any kind . . . concerning a mediation . . . ." Evidence Code section 1121 limits communications about mediation to the court, consistent with Evidence Code section 1119 and further ensuring confidentiality. Plaintiffs claim Evidence Code section 1121 also precludes threats to communicate made during the mediation, and suggest Evidence Code section 1119 must yield to this prohibition. We disagree. The comments following Evidence Code section 1121 do provide "the focus is on preventing coercion" and "a mediator should not be able to influence the result of a mediation . . . by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (2009 Ed.) foll. § 1121, p. 405.) But the comments, at most, reflect that discouraging coercion and threats to disclose is a goal of limiting reports about mediation. They do not expand Evidence Code section 1121 to prohibit such threats (which *would* create tension with Evid. Code, § 1119).[10]

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10 Plaintiffs contend *Vitakis-Valchine v. Valchine* (Fla. Dist. Ct. App. 2001) 793 So.2d 1094 (*Valchine*) is consistent with California law and supports liability against Justice Trotter. Not so. There, the wife in a marital dissolution moved to set aside an agreement based on mediator conduct that included, among many other things, stating he would tell the judge "the settlement failed because of her" and imposing time pressure (including saying the parties had five minutes to finish because his "family [was] more important"). (*Id*. at pp. 1097, 1098-1100.) The court held an agreement could be set aside due to violations of Florida's mediator conduct rules, but added no misconduct findings were made and only that "[a]t least some" claims were sufficient. (*Id*. at p.

Finally, Plaintiffs argue we have a duty "not to . . . shield the misconduct" and suggest we should decline to follow Evidence Code section 1119, craft an exception, and recognize the need to protect parties from private mediators (noting the existence of rules for court-program mediators). First, they argue "[t]he [L]egislature could not sanctify mediator misconduct, even were that its intent" and that Evidence Code "section 1119 and *Cassel* cannot be read . . . to protect . . . mediator misconduct." But we cannot ignore legislative intent, Evidence Code section 1119 itself, or its interpretation in *Cassel*. (*Nolan*, *supra*, 33 Cal.4th at p. 340; *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 956 ["We may not ignore the express language of a statute."]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [inferior tribunals "are required to follow decisions of courts exercising superior jurisdiction"].) *Superior Court v County of Mendocino* (1996) 13 Cal.4th 45, cited by plaintiffs for the proposition that "courts have the inherent and implied powers necessary to carry out their functions" does not impact our analysis. That principle is not in dispute and the case is otherwise inapposite. (*Id*. at pp. 58-59.) Second, with respect to an Evidence Code section 1119 exception for mediator misconduct, plaintiffs cite a 2014 memorandum and 2015 tentative recommendations from the California Law Revision Commission purportedly supporting such an exception. Again, we are bound by existing law. Lastly, as for

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1100.) California law is not in accord. (See *Provost*, *supra*, 201 Cal.App.4th at p. 1302 [declining to set aside settlement from mediation involving alleged counsel and mediator misconduct].) *Valchine* would not aid plaintiffs, regardless. The comment about a report to the judge was one of many at issue, no misconduct finding was made, and the remedy was to set aside the agreement.

whether California law should provide rules for private mediators, that is a decision for the Legislature. (Cf. *Cassel, supra,* 51 Cal.4th at p. 124.)

ii. *Bar on testimony by mediator*

Defendants also contend Evidence Code section 703.5 bars Justice Trotter from testifying about the mediation proceedings. We agree. That section provides:

> "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. "

Justice Trotter's role as mediator renders him incompetent to testify about the mediation. (See *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 365-366 [marital dissolution in which party sought to depose mediator; granting writ directing trial court to vacate denial of protective order for mediation communications and explaining that "[u]nder [Evidence Code] section 703.5, [the mediator] is incompetent to testify"].)

Plaintiffs do not establish any of the Evidence Code section 703.5 exceptions apply. First, with respect to criminal conduct, plaintiffs claim defendants' conduct was criminal, but lack both allegations and evidence. We address the purported crimes, *post*.

Second, plaintiffs identify three provisions that arguably relate to State Bar enforcement. (See Rules Prof. Conduct, rule 5-300(B) ["[a] member shall not . . . communicate with . . . a judge . . . upon the merits of a contested matter pending before

such judge," absent certain exceptions]; Bus. & Prof. Code, § 6068, subd. (f) [duties of attorneys, including "[t]o advance no fact prejudicial to the honor or reputation of a party"]; Bus. & Prof. Code, § 6128, subd. (a) [attorney is guilty of misdemeanor for "deceit or collusion . . . with intent to deceive the court or any party"].). Rule 5-300 is in the "Advocacy and Representation" section of the conduct rules, and inapposite. Even if this and the other provisions pertained to attorneys acting as mediators, they would not apply here. Except as to collusion (which plaintiffs allege, but decline to explain), the provisions implicate communications. But plaintiffs' position is that Justice Trotter *threatened to communicate* what they view as prejudicial and deceitful statements to Judge Stock. To the extent plaintiffs allege the communications actually took place, they rely on speculation and Justice Trotter's failure to deny he spoke to Judge Stock.[11] Speculation is not evidence (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 864), and we address why the adoptive admission argument lacks merit, *post*.

Third, the judicial disqualification provisions do not apply here either. Section 170.1, subdivision (a)(1) requires disqualification when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." Section 170.1, subdivision (a)(6) applies where there are doubts as to the judge's neutrality. There are

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11 Plaintiffs' complaint stated they were not alleging ex parte communications occurred. In their opening brief here, they contend the "undisputed facts show and infer that Justice Trotter did communicate with Judge Stock" (citing the timeline of events in the PBPA litigation); it is "reasonable to believe he did so . . . since JAMS was very likely to have been in discussions with [Judge Stock] at the same time as the 'mediation' "; and "the evidence is that he did ha[ve] a conversation with Judge Stock about this case. He promised to do so and should be taken at his word. He does not deny but adoptively admits it."

no disputed evidentiary facts at issue here regarding the PBPA litigation, and the only alleged impartiality alleged by plaintiffs is that of Justice Trotter, not Judge Stock.

b. *Whether defendants conceded illegality*

Turning back to *Flatley*, Plaintiffs do not establish the first ground for its application: a concession of illegality. (*Flatley, supra*, 39 Cal.4th at pp. 315-316; see also *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367 (*Paul*) [no anti-SLAPP protection where defendants "effectively conceded the illegal nature of their election campaign finance activities"], disapproved on other grounds by *Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 68, fn. 5.) Defendants have not conceded anything and, to the contrary, maintain that mediation confidentiality and Evidence Code section 703.5 preclude Justice Trotter from addressing plaintiffs' allegations.

Plaintiffs contend that "[b]y not denying the charge of wrongdoing, JAMS and Justice Trotter adoptively admit to it." Plaintiffs do not establish they offered defendants' silence as an adoptive admission below, and, to the extent they did, we can infer the trial court rejected it. That rejection was sound. An adoptive admission is a hearsay exception: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) Silence can operate as an adoptive admission, but only where there was an opportunity to reply. (See *J & J Builders Supply v. Caffin* (1967) 248 Cal.App.2d 292, 297-298 [failure of ostensible partner to deny other partner's representation of

partnership during business meeting was admissible as adoptive admission]; *People v. Riel* (2000) 22 Cal.4th 1153, 1189-1190 (*Riel*) [accomplices' use of "they" in conversation with witness, while defendant was present, was admissible as adoptive admission: " 'To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation . . . .' "]; *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 83-85 [accord].) Here, defendants are unable to deny plaintiffs' allegations due to mediation confidentiality and Evidence Code section 703.5. Under the circumstances, their silence is not an adoptive admission.

Plaintiffs contend Evidence Code section 1119 "does not cover silence or conduct," meaning defendants were free to deny plaintiffs' allegations. We disagree. Evidence Code section 1119 does not apply to noncommunicative conduct (*Foxgate*, *supra*, 26 Cal.4th. at p. 18, fn. 14), but silence and other conduct can be communicative (as plaintiffs' adoptive admission argument implies). (See, *e.g.*, *Kupiec v. Am. Internat. Adjustment Co.* (1991) 235 Cal.App.3d 1326, 1333 [alleged concealment of facts held communicative in nature, in litigation privilege context].) Allowing evidence as to what *was not* said during the course of mediation proceedings could expose alleged communications (if only for purposes of denial) and permit inferences as to what *was* said, thus undermining mediation confidentiality. Further, Evidence Code section 703.5 expressly encompasses "conduct . . . at or in conjunction with" the mediation, and would bar Justice Trotter from addressing the mediation regardless.

Plaintiffs' remaining arguments likewise are unpersuasive. First, they rely on three criminal cases, *Riel*, *Salinas v. Texas* (2013) 133 S.Ct. 2174 (*Salinas*) and *People v. Tom* (2014) 59 Cal.4th 1210 (*Tom*), and all three are distinguishable. *Riel* did not involve any limitation on the defendant's speech. (*Riel*, *supra*, 22 Cal.4th at pp. 1189-1190.) *Salinas* and *Tom* held silence could be used against criminal defendants who failed to invoke the Fifth Amendment. (See *Salinas*, at p. 2180 [prosecution's use of noncustodial silence did not violate Fifth Amendment, where defendant failed to invoke privilege]; *Tom*, at p. 1215 [prosecution cited defendant's failure to inquire about vehicle occupants after crash; holding "defendant . . . needed to make a timely and unambiguous assertion of the privilege in order to benefit from it"].) Here, in contrast, defendants have consistently maintained that mediation confidentiality and Evidence Code section 703.5 bar them from responding to plaintiffs' allegations. Second, plaintiffs cite Evidence Code section 413, which provides: "In determining what inferences to draw from the evidence or facts . . . , the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him . . . ." For the reasons discussed *ante*, no inferences can be drawn from defendants' silence.

c. *Whether the evidence conclusively shows illegality*

Plaintiffs also do not establish "illegality is conclusively shown by the evidence," the other *Flatley* ground. (*Flatley*, *supra*, 39 Cal.4th at pp. 315-316; see *Seltzer*, *supra*, 182 Cal.App.4th at pp. 963-967 [rejecting argument that settlement negotiations fell outside § 425.16, where plaintiff failed to " 'conclusively demonstrate[]' " they were conducted in unlawful manner].)

As an initial matter, plaintiffs cannot rely on purported statutory violations unrelated to criminal activity, such as Evidence Code provisions. "[T]he . . . use of the phrase 'illegal' [in *Flatley*] was intended to mean criminal, and not merely violative of a statute." (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654; *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1169 [declining to apply *Flatley* to statements by lawyer that plaintiff claimed violated duties of confidentiality and loyalty; explaining: "[T]he rule from *Flatley* . . . is limited to criminal conduct. Conduct in violation of an attorney's duties of confidentiality and loyalty to a former client cannot be 'illegal as a matter of law' [citation] within the meaning of *Flatley*"]; *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 807 [collecting cases].)[12]

We now address the crimes plaintiffs do allege: conspiracy and extortion. They do not identify evidence sufficient to conclusively establish the elements of these crimes.

First, a conspiracy exists where "two or more persons conspire" to, among other things "pervert or obstruct justice." (Pen. Code, § 182, subd. (a)(5).) Plaintiffs contend defendants conspired to obstruct justice through their "promise and threat to malign Appellants to the trial judge" and "by failing to disclose that JAMS was going to hire the trial judge," which "would have allowed [them] to seek disqualification . . . ." But a conspiracy to obstruct justice generally requires either " 'malfeasance [or] nonfeasance by

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12 We recognize Business and Professions Code section 6128 treats certain attorney misconduct as a misdemeanor. Even if this qualified as criminal conduct under *Flatley*, plaintiffs' allegations are insufficient, for the reasons discussed *ante*. We decline to address each purported violation of a civil statute (except as relevant to other issues).

an officer,' " or " 'anything done . . . in hindering or obstructing an officer in the performance of his official obligations.' " (*People v. Redd* (2014) 228 Cal.App.4th 449, 460, quoting *Lorenson v. Superior Court of Los Angeles County* (1950) 35 Cal.2d 49, 59.) Plaintiffs do not allege, much less identify conclusive evidence of, malfeasance by Judge Stock or that defendants' alleged conduct obstructed the *judge's* performance of her duties.[13]

Plaintiffs' view that they would have been able to disqualify Judge Stock is also meritless. They rely on section 170.1, subdivision (a)(8), which supports disqualification where the judge has an "arrangement concerning prospective employment . . . as a dispute resolution neutral" with an entity, or is participating in such discussions, and "directs the parties" to participate in dispute resolution with that entity. Plaintiffs identify no evidence as to when Judge Stock began discussions to join JAMS, besides speculation and the purported adoptive admissions.[14] As discussed *ante*, neither is sufficient. There also is no evidence Judge Stock directed the parties to mediate with Justice Trotter and

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13 We decline to address defendants' reliance on a civil conspiracy case to contend conspiracy requires two parties and that Justice Trotter and JAMS, as principal and agent, do not qualify. (*Everest Investors 8 v. Whitehall Real Estate Partnership XI* (2002) 100 Cal.App.4th 1102, 1109.) The issue is whether plaintiffs have conclusive evidence of criminal conspiracy. They lack the evidence for this showing, and we need not decide whether agency principles could operate as a separate bar.

14 Plaintiffs acknowledge the trial court found there was no evidence Judge Stock was in conversations with JAMS at the time, but (i) state Judge Stock was absent from court in August 2013 (without a record citation) and note the date of other alleged events in the PBPA litigation, (ii) contend the trial court "overlook[ed]" defendants' adoptive admissions. We observe plaintiffs could have sought discovery on this issue, by noticed motion and for good cause (§ 425.16, subd. (g)).

JAMS. The record reflects the parties initially retained Justice Trotter following an attorney's suggestion and chose to return to him for further negotiations.

Second, extortion consists of "the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear . . . ." (Pen. Code, §§ 518; 524 [attempted extortion].) Fear "may be induced by a threat . . . [t]o expose, or to impute to him, her, or them a deformity, disgrace or crime." (Pen. Code, § 519.) Plaintiffs allege Justice Trotter's purported threat required them "to settle on the terms he dictated . . . , or else he would malign them to their trial Judge in order to prejudice the Judge against them, resulting in them losing their case and property, i.e. their homes." They note he "follow[ed] up to see if his extortionate threat was successful." They further argue defendants "concede that a threat underlies the claims," and their "[f]ailure to deny simple, serious charges prove that Justice Trotter's promise and threat, together with follow-up, was extortion and attempted extortion."[15]

This is not conclusive evidence of extortion, attempted or otherwise. Among other things, plaintiffs do not suggest Justice Trotter's goal was to get their homes, and do not otherwise allege or identify evidence that he intended to or did obtain their property. In their reply brief, plaintiffs contend Penal Code section 518 "does not say the extortionist has to obtain the property," "[t]he extortion just has to be motivated by and involve a financial or beneficial return to the extortionist," and Justice Trotter was motivated by

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15 Plaintiffs also state defendants' actions were "extortion and attempted extortion" under Penal Code section 523. That section applies to writings and ransomware and is irrelevant.

financial gain (i.e., to benefit "repeat JAMS customers"). Plaintiffs raise this point for this first time on reply, cite no authority for it, and it lacks merit regardless. (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1294 (*Malin*) ["[c]riminal extortion laws prohibit the wrongful use of threats to obtain the property of another"]; see *Scheidler v. National Organization for Women, Inc.* (2003) 537 U.S. 393, 404 [under federal Hobbs Act, even when conduct "achieved . . . ultimate goal of 'shutting down' a clinic that performed abortions, such acts did not constitute extortion because petitioners did not 'obtain' respondents' property."].) As for defendants' awareness of plaintiffs' claims, that is no concession as to their truth and we reiterate that defendants' silence does not support an admission of wrongdoing.

Plaintiffs' reliance on *Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405 is misplaced. The case involved a settlement demand by a party, with threats unrelated to the litigation at issue. (*Id.* at pp. 1405, 1410, [demand e-mail that "threatened to expose [Sareen] to federal authorities for alleged violations of the False Claims Act unless [he] negotiated a settlement of [Stenehjem's] private claims" was "extortion as a matter of law"].) Here, in contrast, there is no evidence Justice Trotter sought to obtain anything by way of his alleged threat, and its content related to the PBPA litigation being mediated.

In sum, "we do not find this to be one of those rare cases in which there is uncontroverted and uncontested evidence that establishes the crime as a matter of law." (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 386.)[16]

3. *False advertising*

Plaintiffs also argue they have claims for "unfair and false advertising," and that these claims are not barred by anti-SLAPP. They direct us to statements on the JAMS website, including a Mission Statement that provides, in part: "Everything we do and say will reflect the highest ethical and moral standards. We are dedicated to neutrality, integrity, honesty, accountability, and mutual respect in all of our interactions." Plaintiffs do not establish error here.

First, it does not appear their complaint even alleges false advertising. This claim typically arises under California's False Advertising Law (hereafter FAL) (Bus. & Prof. Code, § 17500 et seq.) and the UCL. (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626 [FAL and UCL "prohibit 'unfair, deceptive or misleading advertising' "].) Plaintiffs did not raise the FAL. They did assert a UCL claim, but regarding defendants' mediation conduct, not the website. The website statements appear in the intentional misrepresentation claim, but this too focuses mainly on the alleged statements and omissions during the mediation proceedings. Meanwhile, on reply here, plaintiffs do not

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16 Under *Flatley*, if "a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley*, *supra*, 39 Cal.4th at p. 316.) Given the dearth of admissible evidence or sufficient allegations to support conspiracy or extortion, we conclude plaintiffs could not establish a probability of success on these issues and need not address them further.

dispute the complaint lacks a false advertising claim (but, rather, suggest defendants' brief concedes they engaged in false advertising; it does not). In any event, to the extent plaintiffs' allegations relate to false advertising, those issues are peripheral to their claims—which, by their own characterization, are based on "mediation misconduct." (See *Scott*, *supra,* 115 Cal.App.4th at p. 414 [gravamen of claim controls].)[17] Second, regardless of whether plaintiffs pled a false advertising claim (or misrepresentation or fraud allegations implicating this issue), they cannot establish error. They provide no legal authority to establish the purported false advertising lacks anti-SLAPP protection, and forfeit the argument. (*Stanley*, *supra*, 10 Cal.4th at p. 793.)[18]

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17 Although we do not base our reasoning here on *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, decided after the parties completed their briefing, we note it reaches a consistent outcome. (*Id.* at p. 396 [when allegations involve protected and unprotected activity, unprotected activity is disregarded at prong one].)

18 We recognize there is a commercial speech exemption under section 425.17, which can limit protection where the speech at issue is primarily commercial. But here, the grounds for plaintiffs' case are Justice Trotter's alleged statements and omissions at the mediation, not the reasons plaintiffs decided to mediate or continue mediating. (See *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 490-491 [commercial exemption did not apply to attorney communications with prospective client; "A dispute involving a lawyer's advice . . . on pending litigation . . . , while it may include an element of commerce or commercial speech, is fundamentally different from the 'commercial disputes' the Legislature intended to exempt from the anti-SLAPP statute."].) At any rate, plaintiffs did not raise the exception, and we do not address it further. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 26 ["The burden of proof as to the applicability of the commercial speech exemption, therefore, falls on the party seeking the benefit of it—i.e., the plaintiff."].)

B. *Prong two: Whether plaintiffs established a probability of prevailing at trial*

1. *Plaintiffs have no admissible evidence*

As we concluded *ante*, mediation confidentiality and Evidence Code section 703.5 apply here. As a result, plaintiffs cannot rely on their own declarations about the mediation, compel Justice Trotter to testify, or infer anything from his silence. They also have identified no evidence as to when Judge Stock joined JAMS. Plaintiffs therefore lack admissible evidence to support their claims and cannot meet their burden to show a probability of prevailing at trial. (*Kashian*, *supra*, 98 Cal.App.4th at p. 906.)[19] Nevertheless, we elect to address the trial court's conclusions on quasi-judicial immunity and the litigation privilege.

2. *Quasi-judicial immunity*

Howard, *supra*, 222 Cal.App.3d at page 853, the psychologist case noted *ante*, supports application of quasi-judicial immunity here. In *Howard*, the court explained that "in determining whether a person is acting in a quasi-judicial fashion, the courts look at 'the nature of the duty performed [to determine] whether it is a judicial act . . . .' " (*Id.* at p. 853.) The court contrasted this nonadvocacy work with that of advocates, like public defenders. (*Id.* at p. 859 ["the focus is more correctly placed on a nonadvocate vs.

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19 Defendants contend mediation confidentiality and Evidence Code section 703.5 preclude them from defending themselves, and also limits plaintiffs' ability to prevail. We recognize this principle (e.g., *Solin v. O'Melveny and Myers* (2001) 89 Cal.App.4th 451, 466 [affirming dismissal of malpractice action where defense would involve confidential and privileged client information]), but we do not see how it becomes relevant here. If mediation confidentiality applies, as we conclude it does, plaintiffs have no evidence on which to proceed—and defendants' ability to defend themselves becomes moot.

advocate analysis"]; *ibid*. [criminal defense attorney's "job as an *advocate* for the defendant . . . makes him or her responsible . . . to the defendant and susceptible to a later civil action"].) Applying these principles, the court concluded quasi-judicial immunity applied not only to the psychologist case evaluator there, but also to other third party neutrals, including mediators (and without limitation to court-connected mediators):

> "The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee; hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes. . . . [¶] We therefore hold that absolute quasi-judicial immunity is properly extended to these neutral third parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes."

(*Id.* at p. 860.)

Courts have followed *Howard's* approach, and applied quasi-judicial immunity in a variety of contexts. (See, *e.g.*, *McClintock v. West* (2013) 219 Cal.App.4th 540, 550-552 (*McClintock*) [quasi-judicial immunity applied to guardian ad litem]; *La Serena Properties, LLC v. Weisbach* (2010) 186 Cal.App.4th 893, 903 (*Weisbach*) [concluding arbitrator's "alleged failure to make adequate disclosures of potential conflicts of interest falls within the scope of the absolute immunity for quasi-judicial acts"].) Federal courts have applied *Howard*, or similar reasoning, to accord immunity to mediators. (See *St. Paul Fire & Marine Ins. Co. v. Vedatech Int'l., Inc.* (9th Cir. 2007) 245 Fed.Appx. 588, 592 (*Vedatech*) [concluding quasi-judicial immunity under California law applied to

mediator, citing *Howard*]; *Wagshal v. Foster* (D.C. Cir. 1994) 28 F.3d 1249, 1250 [applying federal quasi-judicial immunity principles and concluding a "court-appointed mediator or neutral case evaluator, performing tasks within the scope of his official duties, is entitled to absolute immunity"].)

We conclude quasi-judicial immunity applies here. Justice Trotter was "performing dispute resolution services which are connected to the judicial process," involving "mediation . . . of [a] pending dispute[]." (*Howard, supra,* 222 Cal.App.3d at p. 860; see *Vedatech,* 245 Fed.Appx. at p. 592; see also *Weisbach*, *supra*, 186 Cal.App.4th at p. 901 ["Where immunity applies, it likewise shields the sponsoring organization . . . from liability arising out of the quasi-judicial misconduct alleged."].)

Plaintiffs make several arguments against application of *Howard*, and all lack merit. First, they contend the psychologist in *Howard* was a decision maker (or, at least, intended to influence the court) and "[t]he foundation of immunity is the decision maker protection." *Howard* is to the contrary. The psychologist "render[ed] *nonbinding* findings and recommendations . . . ." (*Howard, supra,* 222 Cal.App.3d at p. 848, italics added.) The court found quasi-judicial immunity protects not only those who make binding decisions, but also those who make recommendations or, as here, mediate disputes. (*Id.* at p. 860.) In a related contention, plaintiffs argue: "*Howard* is illogical to extend immunity to a private contract mediator that by definition is not a decision maker." Given *Howard*'s reasoning does not require decisionmaking ability, there is nothing inconsistent about its conclusion that immunity applies to mediators.

Second, plaintiffs purport to accept *Howard's* distinction between advocates and nonadvocates (with only the latter receiving immunity), but then contend that "[o]ther than court appointed mediators, the immunity benefactors [in *Howard*] are all decision makers" and "[i]n the end they are an advocate for one side," while "as non-advocates, mediators cannot be granted immunity." *Howard* is again to the contrary. The psychologist was "not an advocate," and did have immunity. (*Howard*, *supra*, 222 Cal.App.3d at p. 859; cf. *ibid.* [criminal defense attorney *was* advocate and not immune to civil action]; see *Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 98 [holding psychologist retained by public defender did not have immunity; explaining *Howard* "reasoned that the availability of the immunity turns on whether the person is functioning as an advocate or a nonadvocate" and that in "[i]n this role as [defendant's] advocate, [the psychologist] is not entitled to quasi-judicial immunity."].)

Plaintiffs also contend that "[a] conflicted and biased 'mediator' is not a mediator at all but an advocate for one side against the other. . . . Without neutrality, there can be no immunity." This contention appears to contradict their other advocate argument, and still misconstrues *Howard*. *Howard* requires neutrality in role, not impartiality in practice and the factual inquiry such a standard would require. (*Howard, supra*, 222 Cal.App.3d at p. 864 ["If such protection is to be meaningful it must be effective to prevent suits such as this one from going beyond demurrer. . . . In order to best protect the ability of neutral third parties to aggressively mediate or resolve disputes, a dismissal at the very earliest stage of the proceedings is critical to the proper functioning and continued availability of these services."].)

Third, plaintiffs argue there is no immunity for crime, and "*Howard* does not apply where the facts are the mediator committed prohibited archetype mediator misconduct." They cite *Forrester v. White* (1988) 484 U.S. 219, in which the United States Supreme Court held federal official immunity did not shield a judge from an employee's claim that he demoted and discharged her on the basis of sex, explaining the "decisions were not judicial acts for which he should be held absolutely immune." (*Id.* at p. 221.) *Forrester* applies federal, not California, law, and does not aid plaintiffs regardless. Plaintiffs do not allege misconduct separate from Justice Trotter's quasi-judicial role as a mediator. It is only where the conduct at issue is *not* judicial or quasi-judicial in nature, as with the employee demotion and discharge in *Forrester*, that immunity is inapplicable.

Finally, plaintiffs contend *Howard* is a "non-binding decision" and "must be judicially overturned or legislatively nullified," at least with respect to private mediators. We decline plaintiffs' invitation to reject *Howard*. Stare decisis compels us to consider it, and we believe it was correctly decided. (*The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1529 ["We, of course, are not bound by the decision of a sister Court of Appeal. [Citation.] But '[w]e respect stare decisis . . . . Thus, we ordinarily follow the decisions of other districts without good reason to disagree.' "].)

3. *Litigation privilege*

The litigation privilege can preclude a plaintiff from meeting his or her prong two burden. (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194

Cal.App.4th 873, 888 ["A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim."].)

The litigation privilege is codified in Civil Code section 47, subdivision (b), and provides that publications in legislative, judicial, and certain other official proceedings are privileged. The litigation privilege is "applicable to any communication, whether or not it amounts to a publication," and "even though the publication is made outside the courtroom and no function of the court or its officers is involved." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) The privilege applies "without respect to the good faith or malice of the person who made the statement . . . ." (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.) "Any doubt about whether the privilege applies is resolved in favor of applying it." (*Kashian, supra,* 98 Cal.App.4th at p. 913.)

In determining whether the litigation privilege applies, "[t]he usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg, supra,* 50 Cal.3d at p. 212.) Plaintiffs dispute the existence of all four elements, and we address them in turn.

With respect to the first two elements, plaintiffs maintain there was no mediation and Justice Trotter "had no authority to participate . . . other than as a mediator, which he was not for lack of neutrality . . . ." Those arguments lack merit, for the reasons discussed *ante*, and plaintiffs do not dispute the litigation privilege applies to mediations generally. (See *Makaeff v. Trump Univ., LLC* (9th Cir. 2013) 715 F.3d 254, 264 [noting

California courts have extended litigation privilege to mediation proceedings, citing *Howard*].) Further, elements one and two would be satisfied anyway, as the communications were made during settlement negotiations. (See *Howard*, *supra*, 222 Cal.App.3d at p. 863 [litigation privilege applied to psychologist's statements; rejecting argument that "communications were 'collateral' because they were not made during the course of and as a part of the judicial proceeding' "]; *id*. at pp. 865-866 (conc. & dis. opn. of Danielson, J.) [agreeing litigation privilege applied]; *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 843-844 ["Numerous courts have held that statements relating to settlements also fall within the privilege, including those made during settlement negotiations."].)

As for the third element, the objects of the litigation, plaintiffs contend the "threat to malign [plaintiffs] to their trial judge ha[d] nothing to do with achieving 'the objects of the litigation.' " But there is no dispute Justice Trotter made the alleged statement during settlement negotiations to resolve the PBPA litigation. Plaintiffs' concern appears to be with the content or purpose of the statement. But "[t]he 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent." (*Silberg*, *supra*, 50 Cal.3d at p. 220; see *Asia Investment Co. v. Borowski* (1982) 133 Cal.App.3d 832, 843 [litigation privilege applied to settlement proposal "made in a manner which might be considered a veiled 'threat' "]; see also *Silberg*, at p. 220 [alleged failure to disclose relationship that could impact expert's neutrality was privileged].) For the same reasons, we reject plaintiffs' assertion that "[u]nlawful speech that is extortion cannot 'achieve the objects of the litigation.' "

Finally, with respect to the fourth element, plaintiffs contend Justice Trotter's "statement and threat, i.e. the extortion, had no 'connection or logical relation to the action," citing *Silberg*. Plaintiffs also cite *Flatley* and argue, among other things, that the alleged threat "does not square with the reason for the litigation privilege." Plaintiffs misconstrue both *Silberg* and *Flatley*. There is no real dispute the alleged statement was connected to the PBPA action. What plaintiffs appear to be arguing is that the privilege does not apply to allegedly unlawful conduct, and the law is to the contrary. (*Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 921 [" 'communications made in connection with litigation do not necessarily fall outside the privilege merely because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal' assuming they are logically related to litigation."]; *Malin*, *supra*, 217 Cal.App.4th at p. 1294 ["Under the second step of the statutory analysis, we conclude . . . [the] demand letter is protected by the litigation privilege [citation], which precludes Malin from prevailing on his claim for extortion."].)[20] *Flatley* is consistent with these cases. (39 Cal.4th at pp. 322 & 324 [in concluding litigation privilege was not co-extensive with anti-SLAPP, noting privilege "has been applied in 'numerous cases' involving 'fraudulent communication or perjured testimony" and explaining that applying the "privilege to some forms of unlawful litigation-related activity may advance [its] broad goals . . .

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20 Plaintiffs' contention that this case involves "criminal claims" is unavailing. This is a civil lawsuit and, even in the criminal prosecution context, exceptions are for specific actions. (See *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1245 ["[T]he City contends that the privilege does not apply to criminal prosecutions . . . . We disagree."; noting crimes for which exceptions had been found].)

notwithstanding the 'occasional unfair result' "]; *ibid*. [assuming without deciding the litigation privilege may apply to extortionate threats].)[21]

DISPOSITION

The orders and judgment are affirmed. Defendants are awarded costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

DATO, J.

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21 We observe that, at prong two, plaintiffs focus below and here on defendants' arguments, rather than their claims. But their burden is "to substantiate *each* element of their cause of action, and not merely to counter defendant's affirmative defenses." (*Balzaga v. Fox News Network LLC* (2009) 173 Cal.App.4th 1325, 1337.) To the extent plaintiffs fail to reach these issues, they have forfeited them. Further, we note, and reject, plaintiffs' suggestion that whether defendants had an obligation to refrain from making an alleged threat in front of their opponents or to disclose Judge Stock's alleged discussions with JAMS are issues of law in this anti-SLAPP appeal. Where these issues are implicated by the anti-SLAPP questions before us, we address them.